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No. 91-329

In the Supreme Court of the United States

OCTOBER TERM, 1991

REBEL MOTOR FREIGHT, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in an action by an insolvent motor carrier to collect undercharges based on the tariff rate, the shipper must pay the tariff rate prior to a determination by the Interstate Commerce Commission (ICC) of the reasonableness of that rate, even though the motor carrier's insolvency precludes satisfaction of any subsequent reparations order.

2. Whether, if referral to the ICC is permissible, the shipper must present evidence of the unreasonableness of the rate to the trial court before the court is required to stay the undercharge action and refer the issue to the Commission.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is unreported, but the judgment is noted at 933 F.2d 1009 (Table). The decision of the Interstate Commerce Commission (Pet. App. 8a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1991. The petition for a writ of certiorari was filed on August 23, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*, regulates interstate transportation by motor

carriers. A motor common carrier providing transportation subject to regulation under the Act must publish its rates in tariffs filed with the Interstate Commerce Commission (ICC). 49 U.S.C. 10761(a), 10762(a)(1). In order to protect shippers against discriminatory rates, the Act states that a carrier providing transportation "may not charge or receive a different compensation for that transportation * * * than the rate specified in the tariff." 49 U.S.C. 10761(a).

The Act also requires that a carrier's rates and practices must be reasonable. 49 U.S.C. 10701(a). The authority to enforce the requirement of reasonable rates and practices belongs to the ICC. 49 U.S.C. 11705(b)(3); 10704(b)(1). A carrier is liable for damages for imposition of rates and practices that the Commission finds to be unreasonable. 49 U.S.C. 11705(b)(3). If the ICC determines that a carrier is charging an unreasonable rate or is engaging in a practice that is unreasonable, the ICC "shall prescribe the rate * * * or practice to be followed" by the carrier. 49 U.S.C. 10704(b)(1).

2. Petitioner Rebel Motor Freight, Inc., was a motor common carrier subject to ICC regulation. In 1983, petitioner negotiated with Sunshine Mills, Inc. (Sunshine), a manufacturer of dog food, over shipping rates for the transportation of Sunshine's products. Petitioner agreed to ship Sunshine's products at a rate based on the cost of Sunshine's own private carriage operations. Petitioner thereafter billed and collected at that rate, but failed to file the negotiated rate in its tariffs with the ICC. Years later, petitioner sought to collect $6,007.60 in additional charges for the transportation, reflecting the higher rate found in petitioner's tariffs on file with the ICC at the time. Sunshine refused to pay the additional charges. In

1986, petitioner sued Sunshine in a Tennessee state court to collect the purported undercharges. When Sunshine offered no defense, the state court rendered judgment for petitioner. Pet. App. 2a-3a, 9a.

Sunshine appealed to the Circuit Court of Tennessee for the Thirtieth Judicial District, which, at Sunshine's request, referred the case to the ICC. Relying on its *Negotiated Rates* policy statements, see *National Indus. Transp. League—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986) and 5 I.C.C.2d 623 (1989), the ICC found that petitioner's solicitation and billing practices constituted an unreasonable practice in violation of 49 U.S.C. 10701(a) and, therefore, that Sunshine should not be required to pay additional charges for the difference between the negotiated rates and the tariff rates. Pet. App. 9a-11a.

3. Petitioner filed a petition for review in the court of appeals.[1] The court postponed briefing until this Court had issued its decision on the validity of the ICC's *Negotiated Rates* policy in *Maislin Industries, Inc.* v. *Primary Steel, Inc.*, 110 S. Ct. 2759, 2768 (1990). In *Maislin*, this Court held that the ICC's *Negotiated Rates* policy "rests on an interpretation of the Act that is contrary to the language and structure of the statute as a whole and the require-

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[1] Pursuant to 28 U.S.C. 1336(b), when a United States District Court refers questions to the ICC for determination, the referring court has exclusive jurisdiction to enforce or set aside the ICC's decision arising out of the referral. In this case, a state court referred questions to the Commission and there is no analogous provision in the United States Code providing for review in the state court of the decision on referral. Instead, review of the ICC's decision lies in the court of appeals. 28 U.S.C. 1336, 2321, 2342(5).

ments that make up the filed rate doctrine in particular." In light of *Maislin* and *Orr* v. *ICC*, 912 F.2d 119 (6th Cir. 1990), the court of appeals reversed the ICC's determination that petitioner's collection of its filed rates was barred under the *Negotiated Rates* policy. Pet. App. 4a.

The court of appeals then held that it was appropriate to remand the case to the ICC for a determination whether petitioner's filed rates were reasonable. The court noted that in *Maislin*, this Court had emphasized that the Act requires that filed rates be "reasonable" and had suggested that the reasonableness of the carrier's filed rates in that case was an issue that remained open for review on remand. Pet. App. 4a, citing *Maislin*, 110 S. Ct. at 2767 & n.10. The court of appeals further rejected petitioner's claim that *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464 (1959), requires the conclusion that a shipper may not assert reasonableness as a defense in an action to recover tariff charges. The court observed that "the precedential value of *T.I.M.E.* has been greatly eroded" because Congress legislatively repudiated that decision.[2] Pet. App. 5a-6a.

Finally, the court distinguished the Third Circuit's unpublished decision in *Branch Motor Express Co.* v. *Caloric Corp.*, 914 F.2d 241 (1990) (Table), where the court of appeals, in another post-*Maislin* case, had refused to remand to the ICC for the Commission to consider the reasonableness of the carrier's rates. In that case, the court explained, the Third Circuit had emphasized the shipper's failure to pro-

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[2] See Act of Sept. 6, 1965, Pub. L. No. 89-170, §§ 6-7, 79 Stat. 651-652, codified at 49 U.S.C. 11705(b)(3) and 11706(c)(2). The amended statute gives shippers the right to recover reparations for unreasonably high rates.

vide any support for its claim of unreasonableness, whereas here Sunshine was "prepared to put on evidence regarding the reasonableness of the rates." Pet. App. 6a. The court concluded that, if this case were not remanded to the ICC, the Commission would lose the opportunity to address the reasonableness of petitioner's rates and thereby implement the statutory requirement that rates must be reasonable. *Ibid.* The court emphasized, however, that *Maislin* does not require referral to the ICC in every case, because that would weaken the "strict adherence" to the filed rate doctrine required by *Maislin*. *Id.* at 7a.

ARGUMENT

The court of appeals' interlocutory decision, which grants a remand to the ICC on the issue of rate reasonableness, is correct and consistent with this Court's decisions. There is no square conflict between the decision in this case and a published decision of another court of appeals. The petition for a writ of certiorari should therefore be denied.

1. Petitioner contends (Pet. 7-18) that the shipper in this case may not defend against the action for undercharges by having the court refer to the Commission the issue of whether petitioner's tariff rates are reasonable. Instead, petitioner asserts that even though petitioner's bankruptcy precludes any effective remedy in reparations once the collection action is completed, the filed rate doctrine requires a court to enforce the tariff rate, leaving the shipper only with a theoretical and ineffective remedy in reparations proceedings. That contention is incorrect.

a. The Interstate Commerce Act requires that carriers file their rates in public tariffs and charge and

collect only the filed rates.[3] Those requirements were designed to prevent carriers from engaging in rate discrimination that favored some shippers over others. See, *e.g.*, *New York, N.H.&H.R.R.* v. *ICC*, 200 U.S. 361, 391 (1906); *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. 336, 343-344 (1982). As the Court explained in *Maislin*, to implement the tariff requirements of the Act, this Court developed the principle that neither misquotation by the carrier nor the shipper's ignorance of the tariff rate affords a defense to the carrier's court action to collect the filed rate. 110 S. Ct. at 2765-2766. That principle has come to be known as the "filed rate" doctrine. *Id.* at 2766.

It has long been recognized, however, that "[t]he filed rate doctrine * * * contains an important caveat: the filed rate is not enforceable if the ICC finds the rate to be unreasonable." *Maislin*, 110 S. Ct. at 2767, citing *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915). The Commission alone is empowered to determine the reasonableness of rates; courts are barred from addressing the issue. *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *Arizona Grocery Co.* v. *Atchison, T.& S.F. Ry.*, 284 U.S. 370 (1932). Thus, to protect the Commission's ability to enforce the Act's reasonableness requirement, courts have applied the doctrine of primary jurisdiction. That doctrine requires that "[w]henever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission."

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[3] See Act of Feb. 4, 1887 (Act to Regulate Commerce of 1887), ch. 104, 24 Stat. 379. The current codification of this requirement, as applied to motor common carriers, is found at 49 U.S.C. 10761(a).

Great Northern Ry. v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922).

Normally, when disputes arise over the reasonableness of a tariff rate, the Commission's primary jurisdiction is adequately protected by requiring the shipper to pay the asserted tariff rate and then contest its reasonableness in a separate reparations proceeding. See *Pennsylvania R.R.* v. *International Coal Mining Co.*, 230 U.S. 184, 197 (1913); *Arizona Grocery Co.*, 284 U.S. at 384. The ICC supports that procedure as the general practice in this area. But in the present context, a court's refusal to refer the rate reasonableness issue for an ICC determination before the shipper has paid would defeat the ICC's primary jurisdiction. The motor carrier in this case is insolvent and hence is unable to satisfy any subsequent reparations order. In these circumstances, enforcement of the filed tariff without referral to the ICC would nullify the reasonableness requirement of the statute: it would undermine the ICC's exercise of its unreasonable-rate jurisdiction and deny the shipper an adequate remedy.

A sound application of the Act does not require Sunshine to pay petitioner's tariff rates before the ICC can determine whether those rates are reasonable. No carrier has a right to collect rates that the ICC finds are unlawful, cf. *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939); *Pennsylvania R.R.* v. *United States*, 363 U.S. 202, 205 (1960), and, of course, petitioner's creditors in bankruptcy have no greater standing. Nor is immediate payment required to achieve the goals of the filed rate doctrine. The primary purpose of the doctrine is to prevent unlawful rate discrimination through the granting of unpublished rebates

or discounts. *Maislin*, 110 S. Ct. at 2766. There is no possibility, however, that impermissible discrimination will occur as a result of staying Sunshine's payment of the tariff rate while the reasonableness of that rate is being resolved.[4] Immediate payment is also unnecessary to aid petitioner in timely collection of its published charges—one of the goals of the filed rate doctrine. *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. at 520-521. When a carrier continues to operate, the requirement of immediate payment assists to maintain the carrier's financial solvency and thus contributes to a stable transportation system. Here, however, because the carrier is no longer operating, immediate payment is not necessary to preserve its operating capital. There is no justification, therefore, for frustrating the ICC's enforcement of the reasonableness requirement of the Act.

This Court has emphasized that judicial review of ICC determinations should be structured to preserve the ICC's primary jurisdiction and to protect parties unable to benefit from later reparation proceedings. See, *e.g.*, *Burlington Northern Inc.* v. *United States*, 459 U.S. 131, 142 (1982).[5] That principle fully

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[4] Sunshine will ultimately have to pay whatever rates are found to be both applicable and reasonable, which is the same requirement that applies to all other shippers that employed petitioner's transportation services. Moreover, no one has suggested that Sunshine will obtain a de facto discriminatory rate because of an inability to pay the charges that are ultimately found to be due; unlike petitioner, Sunshine is a going concern that is not enmeshed in bankruptcy proceedings.

[5] In *Burlington*, the court of appeals, after vacating the last two of three successive ICC orders, concluded that its decision effectively "revived" the rate level established by the Commission's first order. This Court reversed because the

accords with the court of appeals' conclusion that it was appropriate to refer the rate-reasonableness issue to the Commission.

b. Petitioner errs in contending (Pet. 7-18) that referral to the ICC is inconsistent with this Court's cases. In *Maislin*, the Court made clear that a finding by the ICC that the filed rate is unreasonable is a defense in a collection action. 110 S. Ct. at 2767. The filed rate doctrine has always included the qualification that the filed rate is not enforceable if the rate has been found to be unreasonable. See *Maxwell*, 237 U.S. at 97 (filed rate applies, "unless it is found by the Commission to be unreasonable"); *Keogh* v. *Chicago & Northwestern Ry.*, 260 U.S. 156, 163 (1922) (tariff rate governs shippers' and carriers' rights "[u]nless and until suspended or set aside"). And in *Maislin*, the Court noted that, because the ICC had not determined the reasonableness of the carrier's rates on referral from a court, "[t]he issue of the reasonableness of the tariff rates is open for exploration on remand." 110 S. Ct. at 2767 n.10. Indeed, courts have frequently referred rate reasonableness issues to the ICC, or given effect to ICC rate-reasonableness rulings, prior to payment by the shippers.[6]

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court's action undermined the ICC's jurisdiction to insure reasonable rates and because the railroads, which have no right to reparations, had no way to recover their losses if the rates the court required them to charge were less than those ultimately found reasonable.

[6] *Pennsylvania R.R.* v. *United States*, 363 U.S. at 203 (where railroad sued United States to recover additional charges, the lower court properly "suspended proceedings to enable the parties to have the [ICC] pass on the reasonableness of the rates"); *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 521 (1939) (where shippers were

The cases cited by petitioner (Pet. 7-13, 16-17) are distinguishable. In those cases, the carriers were going concerns that had assets available to pay any reparations later found to be due; accordingly, this Court required the shipper to pay the filed rate before the carrier released the goods.[7] None of those

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already entitled to reparations pursuant to a Commission decision, the carriers' "voluntary reduction of their claim" was a "sensible adjustment of their right to recover the tariff charge and of their obligation to make reparation to the extent that it is unreasonable"); *Chicago, R.I.&P.R.R.* v. *Furniture Forwarders of St. Louis, Inc.*, 420 F.2d 385 (8th Cir. 1970) (where railroad sued for additional unpaid freight charges and shippers claimed rates were unreasonable, court required to stay its hand until ICC reached a final decision); *Union Pac. R.R.* v. *Bay Area Shippers Consolidating Ass'n*, 594 F.2d 1291 (9th Cir. 1979) (railroad sought additional freight charges; district court required to refer rate reasonableness issues to Commission); see also *Delta Traffic Serv., Inc.* v. *Transtop, Inc.*, 902 F.2d 101, 104-105 (1st Cir. 1990) (collecting cases).

[7] See *Gulf, C.&S.F. Ry.* v. *Hefley*, 158 U.S. 98 (1895); *Texas & Pac. Ry.* v. *Mugg*, 202 U.S. 242, 245 (1906) (citing *Hefley* for the proposition that shipper is not entitled to recover the goods upon the tender of payment less than the schedule charges); *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) (shipper had alleged that the carrier had exacated, over its protest at the time of delivery, an unjust and unreasonable rate); *Kansas City S. Ry.* v. *Carl*, 227 U.S. 639, 653 (1913) ("The shipper's knowledge of the lawful rate is conclusively presumed, and the carrier may not be required to surrender the goods carried * * * until the full legal rate has been paid."). Credit was not generally offered. See *Regulations for Payment of Rates and Charges*, 57 I.C.C. 591, 593 (1920) (the "majority of shippers or consignees in the past have paid their freight when they received their goods"). The statements in this Court's cases cited by petitioner (Pet. 7-13) that the shipper must pay first and seek reparations later, *e.g.*, *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204

cases involved a carrier seeking undercharges under the circumstances found here, where the shipper had already paid the full amount originally billed and where reparations as a practical matter would be uncollectible.[8] In sum, in those cases the courts did not face, and did not decide, the issue presented in this case.[9]

Even if the filed rate doctrine ordinarily prohibited a reference to the Commission, it would not do so in the present case, where the carrier did not commence the undercharge action until after the statute of lim-

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U.S. at 444; *Arizona Grocery Co.* v. *Atchison, T.&S.F. Ry.*, 284 U.S. at 384; *Crancer* v. *Lowden*, 315 U.S. 631, 635-636 (1942), must be understood in light of the background principle that disputes over the reasonableness of rates should not be a means of obtaining delivery without payment.

[8] See, *e.g.*, *Crancer* v. *Lowden*, 315 U.S. 631, 636 (1942), where the Court, in requiring payment prior to determination of rate reasonableness, noted that the shipper could always recover reparations if the rate were later determined to be unreasonably high.

[9] Also wide of the mark is petitioner's reliance on *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464 (1954). As the court of appeals observed, "the precedential value of *T.I.M.E.* has been greatly eroded" because Congress has legislatively overruled that decision and the Act now permits retrospective examination of the reasonableness of motor carrier rates. Pet. App. 5a. Petitioner fares no better in arguing (Pet. 14-15) that the courts of appeals have construed the statutory language to bar reasonableness defenses in motor cases. The cases relied upon by petitioner, *Mohasco Indus., Inc.* v. *Acme Fast Freight, Inc.*, 491 F.2d 1082, 1084 (5th Cir.), cert. denied, 419 U.S. 842 (1974), and *United States* v. *Associated Transport, Inc.*, 505 F.2d 366 (D.C. Cir. 1974), merely distinguished between the administrative reparations remedy enacted to overrule the *T.I.M.E.* decision and common law restitution. They have no relevance to the question here, which goes to the *timing* of the reparations remedy.

itations had run on the right to seek reparations. In *United States* v. *Western Pacific R.R.*, 352 U.S. 59 (1956), carriers sued the shipper (the United States) in the Court of Claims for additional charges. The shipper interposed a rate reasonableness defense (among others), but the Court of Claims found referral to the ICC barred by the two-year statute of limitations for recovering overcharges. This Court reversed, holding that the rate reasonableness issue had to be referred to the ICC. The Court explained that "[o]nly the clearest congressional language could force us to a result which would allow a carrier to recover unreasonable charges with impunity merely by waiting two years before filing suit." 352 U.S. at 71.

Here, as in *Western Pacific*, the statute of limitations would bar affirmative reparation claims for the lion's share, if not all, of Sunshine's shipments if Sunshine could not assert its rate reasonableness defense to the carrier's collection action.[10] Under the rule in *Western Pacific*, because petitioner delayed in filing suit until the shipper's reparations claim became time-barred, it cannot rely on the filed rate doctrine to thwart review of its rates by the ICC. Accord *Duffy* v. *BMG Indus., Inc.*, 938 F.2d 353, 357 (2d Cir. 1991).

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[10] A shipper must begin a civil action to recover damages from a motor carrier within two years after the claim accrues. 49 U.S.C. 11706(c)(2). The claim accrues on delivery or tender of delivery by the carrier. 49 U.S.C. 11706(g). Sunshine's shipments moved in 1983. Rebel did not begin asking Sunshine for additional charges until 1986. Pet. App. 9a. Even if Sunshine had paid Rebel and filed a civil action the day it received Rebel's first dunning letter, the statute of limitations would have barred its claims.

2. Petitioner also errs in contending (Pet. 18-26) that there is a conflict in the courts of appeals that merits this Court's review. The Sixth Circuit in this case and the First Circuit in *Delta Traffic Serv., Inc.* v. *Transtop, Inc.*, 902 F.2d 101 (1990), are in accord in finding that a reference to the ICC on the issue of rate reasonableness is permissible. The Second Circuit specifically left that question open in *Duffy* v. *BMG Indus., Inc.*, 938 F.2d at 357, instead resolving that case on a narrower ground.[11]

Petitioner's reliance on the unpublished decision of the Third Circuit in *Branch Motor Express Co.* v. *Caloric Corp.*, 914 F.2d 241 (1990) (Table), is misplaced. In that case, the court did not address whether referral to the ICC is ever permissible, but found only that the particular shipper had made an insufficient showing to justify that relief. In *Advance-United Expressways, Inc.* v. *Duro Metal Mfg. Co.*, No. 90-7068 (5th Cir. Aug. 23, 1991) (per curiam), the court did address the question whether referral to the ICC is ever appropriate, and concluded that it is not. *Duro Metal*, however, is unpublished and therefore has no precedential force. Moreover, it also relied on the alternative ground that the shipper there "completely failed to show that there exists any issue of material fact concerning the reasonableness or the applicability of the [tariff] rates." Slip op. 4. In *In re Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388 (5th Cir. 1989), cert. denied, 110 S. Ct. 3254

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[11] As we have noted, the ground on which the court relied in *Duffy*—that the statute of limitations had run on a reparations action before the carrier filed suit—is also available here. Petitioner does not contend that there is any conflict in the circuits on that issue.

(1990), the court indicated that the filed rate doctrine bars a stay of undercharge proceedings in district court to allow the ICC to adjudicate the reasonableness of rates.[12] That statement, however, was dictum, because the shipper there had requested a referral to the Commission only on the issue of the reasonableness of the carriers' practices under the ICC's then-applicable *Negotiated Rates* policy, and had not claimed that the carrier's tariff rates were unreasonable. The issue presented in this case is now squarely before the Fifth Circuit in *Advance-United Expressways, Inc.* v. *Eastman Kodak Co.*, No. CA 3-89-2025-G (N.D. Tex., Nov. 30, 1990; Dec. 13, 1990; Mar. 12, 1991), appeal pending, No. 91-1320, and the ICC has filed a brief as amicus curiae in support of the shipper. Given the absence of any published decision that creates a circuit conflict on this issue and the pendency of other litigation that raises the question presented in the petition, we do not believe that this Court's intervention is warranted at this time.[13]

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[12] The court in *Caravan* relied on *Southern Pacific Transp. Co.* v. *San Antonio*, 748 F.2d 266 (5th Cir. 1984), which held that a court cannot stay a carrier's undercharge action pending the outcome of an ICC proceeding to determine the reasonableness of the tariff rate; the shipper's only remedy is to seek reparations from the carrier in a separate proceeding. In that case, however, the carrier was not insolvent and the undercharge action was not delayed until after the statute of limitations had run on any reparations claims. Accordingly, the *San Antonio* case and the ICC's position in that case are consistent with our position here. See Pet. 20 n.4.

[13] The same observation applies to the second question presented by the petition, which raises the issue of what quantum of preliminary proof must be presented to a trial court to justify referral to the ICC on a rate-reasonableness claim. Pet. i. Petitioner points (Pet. 26-28) to only one other court

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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of appeals decision that addresses this issue, *Branch Motor Express Co.* v. *Caloric Corp.*, *supra*. That decision, like the decision below, is unpublished. In any event, as the court of appeals explained, Pet. App. 6a-7a, the two decisions are consistent. The shipper in *Branch* had not sufficiently indicated a willingness to establish the unreasonableness of the rate it purported to challenge. The court of appeals in this case found otherwise with respect to Sunshine, while recognizing that a referral is not required in every case based on a shipper's mere assertion of rate unreasonableness. *Id.* at 7a.

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